IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 391

In the Matter of

The Application of JOSEPH E. LEVINE, a Bankrupt.
Petitioner-Appellant,

To Have a Certain Judgment in Favor of
JACK LEVINE,
Respondent,

Cancelled of Record.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Preliminary Statement

The order which is sought to be reviewed was made in the Supreme Court of the State of New York, County of Kings, on October 10th, 1941. It was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on March 23rd, 1942, and the Court of Appeals of the State of New York denied leave to appeal by an order dated June 11th, 1942 (pgs. 1, 14, 15).

The motion which resulted in the order before re-

ferred to, was made pursuant to Section 150 of the Debtor and Creditor Law of the State of New York, to discharge and cancel of record a certain judgment in the sum of $14,149.00 docketed with the Clerk of the County of Kings on January 3rd, 1940 in favor of the respondent (pg. 1).

Statement of the Case

The statement of facts contained in the petition for a writ of certiorari is contrary to the decision of Hon. George A. Furman, Official Referee, made on January 14th, 1941 (Exhibit A, pgs. 250-252), the opinion of Mr. Justice Nova made on February 13th, 1941 (Exhibit A, pg. 253) and the opinion of the Appellate Division, Second Department, rendered on May 6th, 1941 (Exhibit B).

The facts are these: On January 3rd, 1940, a confession of judgment dated December 18th, 1937 in the sum of $14,149.00 made by the petitioner in favor of the respondent, was docketed against petitioner in the office of the Clerk of the County of Kings. After the service of subpoenas for the examination of the petitioner and his employers, the former filed a petition in bankruptcy in the United States District Court, for the Eastern District of New York. On April 22nd, 1940 he was discharged (pg. 8).

A renewed attempt to examine the petitioner and his employers resulted in a motion made by petitioner to vacate the subpoena and for an adjudication that the obligation referred to in the subpoena had been discharged by the proceedings under the Bankruptcy Act. This motion came on before Mr. Justice Nova at Special Term, Part I of the Supreme Court of the State of New York, County of Kings, who (in order to decide whether the obligation represented by the judgment was dischargeable in nature) referred the question of the relationship between the parties, namely, whether

it was that of debtor and creditor, bailor and bailee, or trustee and cestui que trust, to an Official Referee for hearing and report. After extensive hearings were held affording to both parties a full and complete right of direct and cross-examination, the late Official Referee Furman made a report on January 14th, 1941 in favor of the respondent. This report was later confirmed by Mr. Justice Nova and after an appeal taken by the petitioner, on May 6th, 1941, the Appellate Division, Second Department, unanimously affirmed the determination of Mr. Justice Nova (pgs. 8-9).

Subsequent to all of the foregoing, the petitioner moved for an order pursuant to Section 150 of the Debtor and Creditor Law, to discharge and cancel the judgment of record. This is the motion which was denied by Mr. Justice Lewis, which denial was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and review of which was refused by the Court of Appeals of the Supreme Court of the State of New York, and which underlies the instant petition (pgs. 2-6).

The late Hon. George A. Furman, was the trier of facts and he found that the relationship between the parties was that of trustee and cestui que trust. This view was confirmed by Mr. Justice Nova on motion to confirm the report of the said Referee. When the appeal was taken to the Appellate Division, that Court said:

> "The proof clearly shows that there was a wilful and malicious conversion of the judgment creditor's property by the judgment debtor so that the judgment, by confession entered for such conversion, was not a debt dischargeable in bankruptcy under Subdivision 2 of Section 17 of the Bankruptcy Act, by which are excepted 'liabil-

> ities' * * * for wilful and malicious injuries to the * * * property of another" (pg. 10).

When the application underlying the instant petition was made in the Supreme Court of the State of New York, it was argued that the earlier determination which had been affirmed by the Appellate Division on the facts and on the law, was *res judicata,* and that consequently the remedy under Section 150 of the Debtor and Creditor Law of the State of New York was not available to the petitioner. This view was adopted by Mr. Justice Lewis. The learned Justice said:

> "These earlier proceedings conclusively established the non-dischargeability of the debt in question, and that issue may not be relitigated here by motion made under Section 150 of the Debtor and Creditor Law. In deciding the motion to vacate the subpoena, it was necessary to determine whether the debt had already been discharged. That issue was presented to the Court by both parties. The opinions of the Referee, of Special Term, and of the Appellate Division clearly indicate that precisely such issue was considered and determined. The petitioner has had a full hearing on the matter sought to be adjudicated herein and is bound thereby" (pgs. 11-13).

Reasons for Denial of a Writ of Certiorari

As a preliminary to the statement of the reasons why a writ of certiorari should be denied, it is observable that two reasons are assigned in the petition for the granting of the writ. They are: (a) that the decision in this case is inconsistent with the holding of this Court in *Davis* v. *Aetna Acceptance Co.,* 293 U. S. 328,

and (b) that the decision of the state court herein creates a conflict of authority as to whether mere failure to repay a debt constitutes a wilful and malicious injury to property under Section 17, subdivision 2 of the Bankruptcy Act.

1. The record shows that the decision in question is based upon the ground of *res judicata* and upon an interpretation of a local law, namely, Section 150 of the Debtor and Creditor Law of the State of New York. No federal question was considered or decided.

2. Even if it can be said that a federal question was involved here, the *res judicata* ground is alone sufficient to sustain the decision. Moreover, it does not appear affirmatively that the court could not have decided as it did unless it had decided a federal question.

3. Even if it can be said that a federal question was involved, no showing has been made either that the state court has decided a federal question of substance not theretofore determined by this Court or that it was decided in a way probably not in accord with applicable decisions of this Court.

4. Implicit in the reasons assigned for the granting of the writ, is a requirement that this Court investigate the facts and adopt a view thereof contrary to that taken by the late Hon. George A. Furman, Mr. Justice Nova, and the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

ARGUMENT

Summary of the Argument

POINT I—The petition for a writ of certiorari should be denied because the decision was based upon the grounds of *res judicata* and interpretation of a local law. It does not involve a federal question.

POINT II—If it should be held that a federal question was involved, this Court should, nevertheless, refuse to grant the writ because the record shows other non-federal grounds, namely, *res judicata,* sufficient to sustain the decision.

POINT III—Since it does not appear that (a) the state court of necessity could not have decided as it did unless it decided a federal question, or (b) a federal question was actually determined, the petition should be denied.

POINT IV—The determination of the Appellate Division of the State of New York, Second Judicial Department, on the earlier proceeding which was held to be binding upon the court which decided the motion underlying the instant petition, was based upon decisions theretofore determined and settled by this Court, and was made in strict accordance therewith.

POINT V—Since the question projected requires an investigation of the facts and a new view thereof, the petition should be denied.

POINT VI—The petition for a writ of certiorari should be denied.

POINT I.

The petition for a writ of certiorari should be denied because the decision was based upon the grounds of res judicata and interpretation of a local law. It does not involve a Federal question.

It is settled law that on an application of this kind, a federal question must be involved. It is equally well settled that it is not the function of this Court to decide local questions. Who may sue under a state statute, and when, and under what circumstances, are questions for the exclusive determination of the state tribunal whose judgment thereon is not subject to review by this Court.

In this case, the record shows that the application was made under Section 150 of the Debtor and Creditor Law of the State of New York and that the court held that the petitioner was not entitled to its benefits because a previous decision had determined the matter adversely to him (pgs. 11-13).

In *Chouteau* v. *Gibson*, 111 U. S. 201, the claim of *res judicata* was made. The court held that this was a question of general law and not a federal question. The Court said:

> "Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which decision of the State Court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question

presented by the defense was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties."

The construction and effect of a prior decree of a state court, and how far it bound the state, and whether or not it bound parties subsequently coming in, are matters of state procedure, the rulings on which cannot present any question which will sustain a writ of error from the Federal Supreme Court to a state court. (*King* v. *State of West Virginia,* 216 U. S. 92, 54 Law. Ed. 396):

> "The transcript of the judgment presented to us, which contains the proceedings of the court below, does not present any federal question which authorizes us to review the decision of the state court. Whether or not the adjudication upon the first bonds of the same series could be pleaded as an estoppel of the proceeding for the fundability of other bonds of the same series, is not a federal question". (*John I. Adams & Co.* v. *The Board of Liquidation of The State of Louisiana,* 144 U. S. 651).
>
> "In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in no wise depending

> upon the Constitution, treaties or statutes of the United States." (*The City and County of San Francisco* v. *Itsell*, 133 U. S. 65.)

In *Kenney* v. *Craven*, 216 U. S. 92, 54 Law. Ed. 122, this Court failed to find jurisdiction in a situation where the judgment in the court below was solely based upon the operation and effect of a prior judgment between the parties or their privies. The Court said:

> "Indeed, the fallacy underlying all the contentions urged in favor of our jurisdiction, and the arguments of inconvenience by which those propositions are sought to be maintained, in their ultimate conception, involve the assumption either that the correctness of the state decree, which was held to be *res judicata*, is open for consideration on this record, or assail the conclusively settled doctrine that the scope and effect of a state judgment is peculiarly a question of state law and therefore a decision relating only to such subject involves no federal question."

See also:

> *The Northern Pacific R. R. Company* v. *Ellis*, 144 U. S. 458.

The uniform determination of this Court to deny applications for writs where they involve considerations of local law, is exemplified by the decision of this Court in *Supreme Lodge K. P.* v. *Meyer*, 265 U. S. 30, 44 Sup. Ct. Rep. 432, 433, where the Court said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the

meaning of the state legislation, as though such meaning had been specifically expressed therein."

In *United Gas Public Service Co.* v. *State of Texas*, 58 Sup. Ct. Rep. 483, 491, 303 U. S. 123, 139, the Court said:

"With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. It is not our function, in reviewing a judgment of the state court to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements."

In *De Saussure* v. *Gaillard*, 127 U. S. 216, the Court said:

"That question is not a federal question; it does not arise under the Constitution of the United States, or under any law or treaty made in pursuance thereof. It is not a question, therefore, which, under this writ of error we have a right to review. We are not authorized to inquire into the grounds and reasons upon which the supreme court proceeded in its construction of that statute. It is a state statute conferring rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances,

> are questions for the exclusive determination of the state tribunals, whose judgment thereon is not subject to review by this court."

POINT II.

If it should be held that a federal question was involved, this Court should, nevertheless, refuse to grant the writ because the record shows other non-federal grounds, namely, res judicata, sufficient to sustain the decision.

Where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to sustain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error for that purpose.

In *People of the State of New York, etc.* v. *Atwell*, 261 U. S. 590, 43 Sup. Ct. Rep. 410, the Court said:

> "It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to sustain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose."

In this matter it cannot be argued that the decision

of Mr. Justice Lewis involved a consideration of a federal question. But even if it did, the fact that he rendered his decision upon the ground of *res judicata* would bring it within the ambit of the authorities which sustain the statement made in the preceding paragraph.

Accord:

> "It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a Federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to circumstances." (*Southern Pacific Company* v. *Schuyler*, 33 Sup. Ct. Rep. 277, 280, 227 U. S. 601.)

> "An analogous situation is found in cases where the jurisdiction of this Court has been invoked on writs of error appeals from judgments of state courts, and it appears that, notwithstanding the existence of a federal question, and its consideration and determination by the state court, the judgment rests upon a non-federal ground adequate to support it and hence, would not be affected by a decision by this Court of the federal question. In such cases, we refuse review." (*United States* v. *Hastings*, 296 U. S. 188, 193, 56 Sup. Ct. Rep. 218, 220.)

In *Lynch, et al* v. *People of New York, et al*, 293 U. S. 52, 54, 55 Sup. Ct. Rep. 16, 17, this Court said:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based,

and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

POINT III.

Since it does not appear that (a) the state court of necessity could not have decided as it did unless it decided a federal question or (b) a federal question was actually determined, the petition should be denied.

It has been held repeatedly in this Court that in reviewing a decision of a state court, it is essential to its jurisdiction, that it appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

In *Southwestern Bell Tel. Co.* v. *State of Oklahoma*, 303 U. S. 206, 212, 58 Sup. Ct. Rep. 528, 530, the Court said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state, that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the

federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

In *Chouteau* v. *Gibson,* 111 U. S. 201, the Court said:

> "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

POINT IV.

The determination of the Appellate Division of the State of New York, Second Judicial Department, on the earlier proceeding which was held to be binding upon the court which decided the motion underlying the instant petition, involved decisions theretofore determined and settled by this Court, and was made in strict accordance therewith.

Subdivision 5 of Rule 38 of the Rules of the Supreme Court, contains the following statement: "A review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which

will be considered: (a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

If this Court should be disposed to examine the record of the earlier proceedings which were held to be binding on the court on the motion which underlies this petition, it will find that the decision is based upon a finding of fact that the conduct of the petitioner constituted wilful and malicious injury to the property of the respondent. On the basis of such a finding of fact, it was held, in accordance with innumerable decisions of this Court, that the judgment in question was not dischargeable. The various exhibits submitted to this Court include the legal briefs submitted to the Appellate Division, Second Judicial Department, and they show beyond doubt that the settled authorities justify and sanction the decision.

It is respectfully ventured that a recital and analysis of each of the decisions which support the ruling of the court on the earlier proceeding, would unduly burden the Court and its attention is respectfully directed to Exhibit C, being the Points submitted by the petitioner to the Appellate Division, Second Judicial Department.

POINT V.

Since the question projected requires an investigation of the facts and a new view thereof, the petition should be denied.

It is clear that this Court will not grant certiorari to review evidence and discuss specific facts. Moreover, it is not the province of the Federal Supreme Court to weigh conflicting evidence where the record shows testimony supporting the verdict.

> "We do not grant a certiorari to review evidence and discuss specific facts." (*United States* v. *Johnston*, 268 U. S. 220, 227, 45 Sup. Ct. Rep. 496, 497.)

See also:

> *Great Northern Railway Co.* v. *Donoldson*, 246 U. S. 121, 38 Sup. Ct. Rep. 230.

In the supporting petition, it is asserted that the decision of the state courts creates a conflict of authority as to whether mere failure to repay a debt constitutes a wilful and malicious injury to property. This naturally assumes that the record here shows "mere failure to repay a debt", and this is an assumption which the petitioner indulges without any warrant whatever.

To the precise contrary, the opinions of the late Referee, Hon. George A. Furman, of Mr. Justice Nova (Exhibit A, pgs. 250-252), and of the Appellate Division, Second Judicial Department (Exhibit B) each of them

show that there was a conversion of property belonging to the respondent.

Since this Court will not review evidence and discuss specific facts, the only assigned basis for the granting of the writ is eliminated and it follows from this that the writ should be denied.

POINT VI.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SAMUEL HOFFMAN,
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